

# Resuscitating *Roberts*? How Courts Should Construe the “Emergency” Exception to the Sixth Amendment’s Confrontation Clause

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[O]ur readers will probably feel no hesitation in adopting the language of Mr. Justice Gawdy respecting the trial, namely, that “the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.”<sup>1</sup>

The Court grandly declares that “[w]e leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of ‘testimony’ the Court lists is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.<sup>2</sup>

—Justice Rehnquist

## Introduction

The Sixth Amendment’s Confrontation Clause has received considerable attention on the United States Supreme Court’s criminal docket in recent years. For decades, prosecutors routinely relied upon the lax standard promulgated by the Court in *Ohio v. Roberts*.<sup>3</sup>

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1. D. Jardine, *CRIMINAL TRIALS* 520 (London, Charles Knight 1832).

2. *Crawford v. Washington*, 541 U.S. 36, 75–76 (2004) (Rehnquist, C.J., concurring) (citations omitted).

3. *Ohio v. Roberts*, 448 U.S. 56 (1980). Under *Roberts*, the prosecution was required to satisfy a two-pronged test when offering out-of-court statements. The first prong, unavailability, required the prosecutor to either produce the declarant or establish that the declarant is unavailable. The second prong, reliability, required that the hearsay statement at issue possess

However, since the Court's landmark ruling in *Crawford v. Washington*,<sup>4</sup> the unambiguous requirements under *Roberts* gave way to a less clear and indeed, less developed standard. Following *Crawford*, various factual scenarios have arisen involving out-of-court statements made by declarants unavailable at trial. Consequently, the Court has granted certiorari on issues ranging from whether *Crawford's* ban on testimonial hearsay<sup>5</sup> can be applied retroactively,<sup>6</sup> to the extent of a prosecutor's ability to introduce affidavits signed by non-testifying forensic analysts at trial.<sup>7</sup>

In this resurgence of Confrontation Clause jurisprudence, lower courts have struggled to interpret the Court's use of specific terms, as well the rationales underlying its decisions.<sup>8</sup> In February of 2011, the Court may have added to the confusion when it handed down its opinion in *Michigan v. Bryant*, a homicide case in which the Court considered whether the statements of a dying man made to police were testimonial and therefore inadmissible.<sup>9</sup> The majority, led by Justice Sotomayor, articulated the test to be applied in differentiating testimonial hearsay from statements deemed sufficiently reliable to be admitted at trial:

[W]hen a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the "primary purpose of the interrogation" by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs. The existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing

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sufficient indicia of trustworthiness, meaning that it fall within a "firmly-rooted exception" to the hearsay rule or bear "particularized guarantees of trustworthiness." *Id.* at 66.

4. *Crawford*, 541 U.S. 36.

5. As provided in *Davis v. Washington*, 547 U.S. 813, 822 (2006), an out-of-court statement is testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Likewise, a statement is non-testimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.*

6. *Whorton v. Bockting*, 549 U.S. 406 (2007).

7. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

8. See, e.g., Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 BROOK. L. REV. 241, 266-67 n.54 (2005) (demonstrating several lower courts' confusion and perceived misinterpretation of the Court's use of "testimonial" as it related to the Confrontation Clause).

9. *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

emergency presumably lack the testimonial purpose that would subject them to . . . confrontation . . . . [T]he existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.<sup>10</sup>

Although the Court provides several factors to be weighed in considering the existence of an “ongoing emergency,”<sup>11</sup> it does not make any firm determination as to when an emergency actually begins or ends.<sup>12</sup> In fact, the majority explicitly declines to provide such a standard, and instead merely acknowledges that the emergency in *Bryant* did not continue until the defendant was arrested in California a year after the shooting.<sup>13</sup> Aside from the few guiding factors offered in the *Bryant* opinion,<sup>14</sup> it appears that trial courts and the parties before them are without much in the way of instruction that will enable them to distinguish statements made in the course of an ongoing emergency from testimonial ones.

This paper argues that in the wake of *Crawford*, *Davis*, and *Bryant*, trial courts need a workable definition of “ongoing emergency,” as well as a test or set of guidelines that can be applied in assessing the admissibility of statements made under such circumstances. In essence, this paper seeks to answer two important questions now confronting trial courts: (1) What is an “ongoing emergency,” and (2) what set of factors can enable a trial court to establish the existence of an ongoing emergency?

Ultimately, in defining “ongoing emergency,” this paper borrows from earlier Supreme Court rulings in the Fourth Amendment context. For purposes of the Confrontation Clause, this paper defines “ongoing emergency” the same way the Court has previously defined “exigent circumstances”: A situation in which “there is an imminent risk of death or

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10. *Id.* at 1162.

11. *See id.* at 1163–65 (acknowledging factors such as the presence of a weapon, an absence of knowledge regarding the identity or whereabouts of an assailant, and a declarant’s concerns over the need for emergency medical services). Justice Scalia’s dissent also provides a list of factors he believes the Court found determinative in *Bryant*. *Id.* at 1175–76 (Scalia, J., dissenting).

12. *Id.* at 1164.

13. *Id.* at 1164–65 (“We need not decide precisely when the emergency ended because [victim’s] encounter with the police and all of the statements he made during that interaction occurred within the first few minutes of the police officers’ arrival and well before they secured the scene of the shooting—the shooter’s last known location.”).

14. *See id.* at 1163–65 (acknowledging factors such as the presence of a weapon, an absence of knowledge regarding the identity or whereabouts of an assailant, and a declarant’s concerns over the need for emergency medical services). Justice Scalia’s dissent also provides a list of factors he believes the Court found determinative in *Bryant*. *Id.* at 1175–76 (Scalia, J., dissenting).

serious injury, or danger that evidence will be immediately destroyed” for the purpose of hindering future prosecution, “or that a suspect will escape.”<sup>15</sup> This definition is relied upon in part because it is offered, in dissent, by Justice Ginsburg, a vocal critic of the Court’s apparent retreat from *Crawford*. It is also relied upon, in part, because it seems to stand up to most situations in which officers might obtain statements from a declarant not solely for the purpose of preserving testimony for future prosecution.

This paper also prescribes a flexible totality-of-the-circumstances test that courts can apply in ascertaining whether the facts surrounding a declarant’s statement does, in fact, constitute an emergency. The test places great emphasis on whether the facts create a situation in which the declarant’s statement bears sufficient indicia of reliability to warrant admission. In Part I of this paper, I provide a discussion of the current state of the Confrontation Clause and some of the problems that have transpired in the wake of *Crawford*.

In Part II, I offer hypothetical examples of scenarios in which the lack of an existing framework for identifying an “ongoing emergency” may lead to confusing and potentially undesirable outcomes. I also discuss the need for the Court’s clarification on this matter.

Finally, in Part III, I analogize to the “emergency” exceptions to the Fourth and Fifth Amendments. I then provide a proposal of how the Court might define “ongoing emergency,” and articulate a totality-of-the-circumstances test to guide lower courts in assessing the admissibility of such evidence.

## I. Issues Surrounding the Confrontation Clause

### A. The Abandonment of *Roberts* and the Emergence of a New Standard

For nearly a quarter-century, federal and state courts were governed by the Confrontation Clause as interpreted by the Supreme Court in *Ohio v. Roberts*.<sup>16</sup> In *Roberts*, the defendant was charged in state court with check forgery and receiving stolen credit cards.<sup>17</sup> At trial, the prosecution offered the preliminary hearing transcript, documenting the testimony of a defense witness who provided testimony unfavorable to the defendant at the

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15. *Kentucky v. King*, 131 S. Ct. 1849, 1864 (2011) (Ginsburg, J., dissenting) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).

16. *Ohio v. Roberts*, 448 U.S. 56 (1980).

17. *Id.* at 58.

preliminary hearing and was unavailable at trial.<sup>18</sup> Over the defendant's Confrontation Clause objection, the trial court admitted the transcript.<sup>19</sup> The jury convicted the defendant on both counts.<sup>20</sup> The Ohio court of appeals reversed, and the state supreme court affirmed that ruling.<sup>21</sup>

After granting certiorari, the United States Supreme Court reversed and remanded, holding that where a hearsay declarant is not present for cross-examination, his previous out-of-court statements can overcome a Confrontation Clause challenge upon a showing that (1) he is unavailable and (2) his statement bears "adequate indicia of reliability."<sup>22</sup> Justice Blackmun, writing for the majority, explained that reliability "can be inferred without more . . . where the evidence falls within a firmly rooted hearsay exception," leaving open the possibility of there being additional "particularized guarantees of trustworthiness" beyond the exceptions that would also suffice.<sup>23</sup> This standard endured for nearly twenty-five years, despite being implicated in several cases following *Roberts*.<sup>24</sup> It was not until March 8, 2004, that the Court's Confrontation Clause rulings took a dramatic change of course.

In *Crawford v. Washington*, the defendant was accused of assault and attempted murder following a dispute in which he stabbed a man who allegedly tried to rape his wife.<sup>25</sup> Following the incident, the defendant's wife provided police with a tape-recorded statement in which she described the stabbing.<sup>26</sup> At trial, the defendant's wife refused to testify, invoking Washington's marital privilege.<sup>27</sup>

In lieu of the wife's testimony, the prosecution offered her tape-recorded statements to the police—not barred by the privilege—which lent support to the argument that the defendant was the aggressor.<sup>28</sup> Over the

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18. *Id.* at 59. It is worth noting that despite the nature of the testimony, the defendant did not ask that the witness be deemed hostile, nor did the prosecution conduct any examination of the witness. *Id.* at 58.

19. *Id.* at 59–60.

20. *Id.* at 60.

21. *Id.*

22. *Id.* at 66 (internal quotation marks omitted).

23. *Id.*

24. *See, e.g.*, *Dutton v. Evans*, 400 U.S. 74 (1970) (plurality opinion); *Bourjaily v. United States*, 483 U.S. 171 (1987); *Maryland v. Craig*, 497 U.S. 836 (1990); *White v. Illinois*, 502 U.S. 346 (1992); *Williamson v. United States*, 512 U.S. 594 (1994); *Lilly v. Virginia*, 527 U.S. 116 (1999).

25. *Crawford v. Washington*, 541 U.S. 36, 38 (2004).

26. *Id.*

27. *Id.* at 40.

28. *Id.*

defendant's Confrontation Clause objection, the trial court admitted the recording, finding it to be a statement against penal interest and thus, falling within a firmly rooted exception to the rule against hearsay.<sup>29</sup> The defendant was convicted of assault.<sup>30</sup>

Although the Washington court of appeals reversed, the state supreme court reinstated the conviction.<sup>31</sup> The United States Supreme Court then granted certiorari.

In overruling *Roberts*, the *Crawford* majority—led by Justice Scalia—imposed a more inflexible standard for evaluating out-of-court statements from an unavailable witness.<sup>32</sup> The Court held that in order for testimonial evidence to be admissible, the Sixth Amendment “demands what the common law required: unavailability and a prior opportunity for cross-examination.”<sup>33</sup>

The Court noted that the new rule had supplanted *Roberts*' “vague standards” and “open-ended balancing tests” which were too easily manipulated.<sup>34</sup> By his own admission, Justice Scalia noted the fact, raised in Chief Justice Rehnquist's concurrence,<sup>35</sup> that the *Crawford* opinion fails to articulate a workable definition of what constitutes “testimonial,” thereby leaving trial courts in the dark: “We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”<sup>36</sup>

That day arrived over two years later, in June 2006, when Justice Scalia and a unanimous majority attempted to define “testimonial” statements and distinguish them from “non-testimonial” ones in *Davis v. Washington*.<sup>37</sup> In *Davis*, the Court considered two separate state court

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29. *Id.* The statements sufficed as statements against the wife's interests in that she admitted leading the defendant to the victim's apartment and “facilitat[ing] the assault.” *Id.*

30. *Id.* at 41.

31. *Id.*

32. *Id.* at 68.

33. *Id.*

34. *Id.*

35. *Id.* at 75–76 (Rehnquist, C.J., concurring) (“The Court grandly declares that ‘[w]e leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’’ But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of ‘testimony’ the Court lists is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.”) (citations omitted).

36. *Id.* at 68. *See also id.* at 68 n.10 (explaining that the Court's refusal to provide a workable definition will inevitably lead to “interim uncertainty,” but apparently priding itself on the fact that “it can hardly be any worse than the status quo,” referring to *Roberts* as “*inherently*, and therefore *permanently*, unpredictable”).

37. *Davis v. Washington*, 547 U.S. 813 (2006).

convictions involving defendants accused of domestic violence offenses.<sup>38</sup> In both cases, the issue presented was how courts are to differentiate “testimonial” out-of-court statements from “non-testimonial” ones.<sup>39</sup> Because *Crawford* ruled that the Confrontation Clause is only applicable to “witnesses,”<sup>40</sup>—regarded as “those who ‘bear testimony’”<sup>41</sup>—the Court was forced to address what constitutes “testimonial” statements for purposes of confrontation.<sup>42</sup>

In answering this question and reaching its holdings, the Court clearly distinguished between statements given in order to address a present emergency, and those given in any other context:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.<sup>43</sup>

Applied to the facts of each case, this ruling had different outcomes. In one case, *Davis*, the Court held that statements made by a domestic violence victim to a 911 operator identifying her attacker during a frantic phone call were non-testimonial and therefore admissible.<sup>44</sup> “The difference between the interrogation in *Davis* and the one in *Crawford* is apparent on the face of things,” Scalia explained.<sup>45</sup> “In *Davis*, McCottry

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38. *Id.* The case names are *Davis v. Washington* and *Hammon v. Indiana*, both consolidated under *Davis v. Washington*.

39. *Id.* at 817.

40. *Crawford*, 541 U.S. at 51.

41. *Id.*

42. *Davis*, 547 U.S. at 822 (acknowledging that *Crawford* did not offer any definition for “testimonial,” except to note that “[w]e use [it] . . . in its colloquial, rather than any technical legal, sense,” and that “one can imagine various definitions . . . and we need not select among them in this case.”).

43. *Id.* The Court also made clear that its holding did not automatically render statements made outside of an interrogation (i.e., volunteered information) non-testimonial: “The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.” *Id.* at 822 n.1.

44. *Id.* at 829.

45. *Id.* at 827.

[the 911 caller] was speaking about events *as they were actually happening*, rather than ‘describ[ing] past events.’”<sup>46</sup>

Scalia further distinguished *Davis*, noting that McCottry gave her hysterical answers to the operator’s questions by phone, in an environment that was neither tranquil nor safe.<sup>47</sup> Thus, the circumstances of McCottry’s interrogation indicate that she “simply was not acting as a *witness*; she was not *testifying*,” and her statements were not “‘a weaker substitute for live testimony’ at trial.”<sup>48</sup>

By contrast, the Court found the statements used to convict the defendant in *Davis*’ companion case, *Hammon v. Indiana*, to be testimonial hearsay and therefore barred by the Confrontation Clause.<sup>49</sup> There, the victim prepared a handwritten battery affidavit in the presence of officers following her attack.<sup>50</sup> In finding the contents of the victim’s affidavit inadmissible, the Court explained that such statements are testimonial “when the circumstances objectively indicate that there is no such ongoing emergency . . . and . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”<sup>51</sup> Ironically, in the wake of *Crawford* and *Davis*—decisions in which the Court acknowledged its goal of promulgating a Confrontation Clause analysis that was both predictable and faithful to the text of the Sixth Amendment—lower courts have been left with an unpredictable and confusing rule that has led to numerous interpretational problems, as discussed below.

## B. Problems in the Wake of *Crawford* and *Davis*

Without question, *Crawford* marked a significant departure from the Confrontation Clause analysis courts had grown accustomed to applying under *Roberts*. Since 2004, criminal trial courts have faced a constitutional mandate to consider out-of-court statements by unavailable declarants in a new and confusing way. It is thus unsurprising that trial court judges have sought to embrace terminology and tests with which they feel more comfortable as they navigate these relatively uncharted waters. The term

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46. *Id.* (citing *Lilly v. Virginia*, 527 U.S. 116, 137 (1999)). Despite Scalia’s contention, at least one scholar has found this distinction to be unfounded, explaining that by the time McCottry actually made her 911 call, it was apparent that the attack had effectively ended and *Davis* had left the room. Richard D. Friedman, *Crawford and Davis: A Personal Reflection*, 19 REGENT U. L. REV. 303, 307 (2007).

47. *Davis*, 547 U.S. at 827.

48. *Id.* at 828 (citing *United States v. Inadi*, 475 U.S. 387, 394 (1986)).

49. *Davis*, 547 U.S. at 831–32.

50. *Id.* at 820.

51. *Id.* at 822.



“ongoing emergency” represents precisely such a term. As one commentator suggests, trial court judges need some guidance:

This preference for the emergency idea is understandable. We have entered a brave new world of confrontation jurisprudence in which virtually no judges have experience applying even its basic governing principles. It makes sense that judges gravitate toward a concept that at least seems to strike a familiar note with respect to other areas of criminal procedure [citing the Fourth Amendment’s “exigent circumstances” exception and the Fifth Amendment’s “public safety emergency” exception]. Furthermore, the unadorned concept of an emergency is flexible enough that many appellate courts can recite it, comfortable in the knowledge that as a test, it will not stand in the way of reaching their desired, pre-*Crawford* result: upholding the admission of absent victims’ statements alleging potentially criminal behavior, often some kind of domestic violence.<sup>52</sup>

Despite the use of a somewhat familiar “ongoing emergency” exception, the difficulty courts at all levels have encountered in implementing the exception is well-reflected in rulings handed down by both state supreme courts and the United States Supreme Court itself.

In *State v. Kirby*, a kidnapping victim escaped from the car her kidnapper was driving.<sup>53</sup> Upon arriving home, the woman called the police and, over the phone, described what had happened.<sup>54</sup> The following day, in an unrelated incident, the victim died after falling down the stairs in her home.<sup>55</sup> The defendant was charged with second-degree kidnapping, two counts of first-degree burglary, and one count of assault.<sup>56</sup> At trial, the court admitted into evidence the entire 911 call, over the defendant’s Confrontation Clause objection.<sup>57</sup> The defendant was convicted on the kidnapping and assault charges.<sup>58</sup>

On appeal, the State argued that the victim’s statements were made in the course of an “ongoing public safety emergency,” thereby rendering them non-testimonial.<sup>59</sup> The Connecticut Supreme Court found otherwise,

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52. Jeffrey L. Fisher, What Happened—and What is Happening—to the Confrontation Clause?, 15 J.L. & POL’Y 587, 589–90 (2007).

53. *State v. Kirby*, 908 A.2d 506 (Conn. 2006).

54. *Id.* at 512–14.

55. *Id.* at 516.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 523 n.19.

explaining that “accepting the state’s arguments on this point . . . would render virtually any telephone report of a past violent crime in which a suspect was still at large, no matter the timing of the call, into the report of a ‘public safety emergency.’”<sup>60</sup>

In a separate case, the United States Supreme Court also considered a prosecutor’s “ongoing emergency” rationale. In February 2011, the Court handed down a ruling in *Michigan v. Bryant*, in which it considered the admissibility of statements made to police officers by a mortally wounded gunshot victim laying in a gas station parking lot mere hours before his death.<sup>61</sup>

In his statements, the victim identified and described his shooter, and provided officers with the location of where the shooting had occurred.<sup>62</sup> At trial, the victim’s statements were admitted under the excited utterance exception to the hearsay rule.<sup>63</sup> A jury convicted the defendant, Bryant, of second-degree murder, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony. Bryant appealed to the Michigan court of appeals, citing *Crawford*, which had been decided five months earlier.<sup>64</sup> The court of appeals affirmed the convictions.<sup>65</sup>

Bryant appealed the ruling, and the Michigan Supreme Court remanded the case to the court of appeals to be reconsidered in light of *Davis*.<sup>66</sup> On remand, the court of appeals again affirmed, holding that the challenged statements were non-testimonial and were therefore admissible.<sup>67</sup> Bryant again appealed to the Michigan Supreme Court, which reversed his conviction, citing that admission of the contested statements constituted plain error in light of *Crawford* and *Davis*.<sup>68</sup> The United State Supreme Court granted certiorari.

In finding the statements admissible, the Court, led by Justice Sotomayor, held that the circumstances surrounding the interaction “objectively indicate that the ‘primary purpose of the interrogation’ was ‘to enable police assistance to meet an ongoing emergency.’”<sup>69</sup> Thus, the

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60. *Id.*

61. *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

62. *Id.* at 1150.

63. Petitioner’s Brief on the Merits at 3, *Bryant*, 131 S. Ct. 1143 (2011) (No. 09-150).

64. *Id.* at 1150–51.

65. *Id.* at 1150.

66. *Id.* at 1150–51.

67. *Id.* at 1151.

68. *Id.*

69. *Id.* at 1166–67 (quoting *Davis v. Washington*, 547 U.S. 813, 822(2006)).

Court reasoned, the statements were not testimonial, and their admission at Bryant's trial did not violate his right to confrontation.<sup>70</sup>

Interestingly, the *Bryant* Court's majority was sharply critiqued by Justice Scalia, author of the *Crawford* and *Davis* majority opinions. In a scathing dissent, Scalia begins by expressing his dismay not only at what he considers to be a gross departure from *Crawford*, but also at the majority's naivety in reaching its holding:

Today's tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose—is so transparently false that professing to believe it demeans this institution.<sup>71</sup>

Scalia goes on to point out several perceived flaws in the majority's approach. First, he repudiates the Court's test, which focuses in part on whose perspective is significant in determining the primary purpose of an interrogation.<sup>72</sup> In rejecting the Court's suggestion that the perspective of both the declarant and the interrogator should be considered in determining the underlying purpose of the statement, Scalia pulls no punches. Characterizing the majority's analysis as "an unsuccessful attempt to make its finding of emergency plausible," Scalia expresses his disdain at the adoption of a test that looks to the objective purposes of both the declarant and his interrogators.<sup>73</sup>

Instead, Scalia opts for a declarant-centered inquiry, noting that "[t]he hidden purpose of an interrogator cannot substitute for the declarant's intentional solemnity or his understanding of how his words may be used."<sup>74</sup> In other words, police can easily offer a pretextual explanation as to their intentions in questioning an out-of-court declarant, when in reality their underlying goal is little more than to obtain testimony. Accordingly, Scalia contends that the interrogator's purpose is of little consequence.<sup>75</sup>

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70. *Bryant*, 131 S. Ct. at 1167.

71. *Id.* at 1168 (Scalia, J., dissenting).

72. *Id.*

73. *Id.* at 1169.

74. *Id.*

75. *Id.* at 1168 ("Crawford and Davis did not address whose perspective matters—the declarant's, the interrogator's, or both—when assessing 'the primary purpose of [an] interrogation.' In those cases the statements were testimonial from any perspective. I think the same is true here, but because the Court picks a perspective so will I: The declarant's intent is what counts."). Interestingly, despite the contentions in his *Bryant* dissent, *as well as* the fact that Scalia himself authored the majority opinion in *Davis*, that case did *not* hold the victim's

A logical counterargument to this point was raised by Justice Alito during oral arguments:

In a situation like this, do you think it's meaningful to ask what the primary purpose of the victim was when he responded to the police and said who shot him?

You have a man who has just been shot. He has a wound that's going to turn out to be fatal, and he's lying there on the ground bleeding profusely, and he says: My primary purpose in saying this is so that they can respond to an ongoing emergency . . . but I also have the purpose of giving them information that could be used at trial, but it's . . . a little bit less my purpose than responding to the ongoing emergency. It seems like it's totally artificial.<sup>76</sup>

This split between Scalia and the *Bryant* majority poses an interesting dilemma to lower courts attempting to determine the primary purpose of an interrogation and whether the resulting statements are testimonial. As one commentator noted, the majority's "combined approach" is difficult to apply, as trial courts are without guidance as to how to address the "mixed-motive" problem in which police and witnesses have dual or conflicting motives.<sup>77</sup> Further, in such a case, how are courts to determine whether the objective intents of the out-of-court declarants and the police are to carry the same weight?<sup>78</sup>

On the other hand, and in accord with Justice Alito's reasoning, is the fact that even if trial courts embrace Justice Scalia's declarant-centered approach, it is still impossible to know for certain what the declarant's primary purpose actually was.<sup>79</sup> An "objective assessment" is likely the best trial courts can hope to do. Unfortunately, regardless of which answer to the question a court decides on, it is but one part of the current Confrontation Clause analysis.

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statements to be testimonial. See *Davis v. Washington*, 547 U.S. 813, 829 (2006). The Court did, however, find the statements made by the victim in *Davis*' companion case, *Hammon*, to be testimonial. See *id.* at 831–32.

76. Transcript of Oral Argument at 7–8, *Bryant*, 131 S. Ct. 1143 (2011) (No. 09-150), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/09-150.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-150.pdf).

77. Joëlle Anne Moreno, *Finding Nino: Justice Scalia's Confrontation Clause Legacy from its (Glorious) Beginning to (Bitter) End*, 44 AKRON L. REV. 1211, 1217 n.31 (2011). An example of this would be when a victim makes a statement to officers with the intent of the statement being used for prosecutorial purposes, whereas the police obtain the statement in hopes of assuring the immediate safety of the victim and others.

78. *Id.*

79. See also Craig M. Bradley, *Further Confusion Over Confrontation*, 47 TRIAL 52, 54 (2011).

A second factor—taken directly from *Davis*<sup>80</sup>—is the determination of whether a statement is made in the course of an ongoing emergency. In *Bryant*, the Court does little in the way of providing a working definition of “ongoing emergency.” Instead, Justice Sotomayor takes the Michigan Supreme Court to task, noting that the court “repeatedly and incorrectly asserted that *Davis* ‘defined’ ‘ongoing emergency.’”<sup>81</sup> Interestingly, despite its reference to a definition of “ongoing emergency” allegedly provided by *Davis*, the Michigan court does not reiterate the “definition,” instead offering several reasons why the duration of such an emergency is limited.<sup>82</sup>

In response, Justice Sotomayor makes clear that, whatever might constitute an ongoing emergency, whether such a condition exists is merely one factor—“albeit an important” one—that “informs the ultimate inquiry regarding the ‘primary purpose’ of an interrogation.”<sup>83</sup> Elsewhere in the opinion, Sotomayor acknowledges the two additional factors which aid in the determination of whether a statement is testimonial: The “objective intent” of the parties involved,<sup>84</sup> and the “formality” of the encounter between a declarant and police.<sup>85</sup>

To some extent, these factors are interrelated, and as the *Bryant* majority suggests, no factor in and of itself is solely determinative of the “ultimate” primary purpose inquiry.<sup>86</sup> A definition of “formality,” a term discussed by the Court in *Davis*,<sup>87</sup> seems to correspond to a relatively straightforward concept. As one commentator suggested, “formality” seems to hint at statements resembling “affidavits, depositions, prior

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80. See *Davis v. Washington*, 547 U.S. 813, 828 (2006) (“We conclude from all this that the circumstances of McCottry’s interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*.”) (emphasis in original).

81. *Bryant*, 131 S. Ct. at 1158 (citing *People v. Bryant*, 768 N.W.2d 65, 73 (Mich. 2009)) (internal quotation marks omitted).

82. *Bryant*, 131 S. Ct. at 1160.

83. *Id.*

84. *Id.* at 1156.

85. *Id.* at 1160.

86. *Id.*

87. *Davis v. Washington*, 547 U.S. 813, 827 (2006) (“[T]he difference in the level of formality between the two interviews [in *Crawford* and in *Davis*] is striking. *Crawford* was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry’s frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.”).

testimony, or confessions,”<sup>88</sup> in other words, statements bearing a semblance of ritual and procedure in anticipation of litigation.

Ultimately, the issue of objective intent and whose perspective is significant for purposes of Confrontation Clause analysis seems relatively unsettled, as noted above.<sup>89</sup> However, that is beyond the scope of this paper and, at least in the eyes of the *Bryant* majority, an issue that appears to have been resolved in favor of an approach looking to the perspective of witnesses and interrogators alike.<sup>90</sup>

Despite Justice Sotomayor’s acknowledgment that the Court had yet to provide a definition of “ongoing emergency,” the *Bryant* majority nonetheless failed to articulate any workable definition when given the opportunity. To say that determining whether such a situation has arisen is “a highly context-dependent inquiry” is not altogether untrue, yet it does little in the way of aiding a trial court that has been tasked with ascertaining the primary purpose of an interrogation.<sup>91</sup>

Justice Scalia is not the only critic of the *Bryant* decision. Professor Friedman has suggested that *Bryant* represents “a very unfortunate development for the Confrontation Clause.”<sup>92</sup> “The approach that emerges is remarkably mushy, unjustified by any sound reasoning and virtually incoherent. It leaves courts ample room in many types of cases to characterize almost any type of statement as non-testimonial. It will be easily manipulable by governmental authorities and at times may distort their behavior,” Friedman explains.<sup>93</sup>

Not only is Professor Friedman right in his recognition of *Bryant*’s malleable standard, he also provides a cogent explanation as to what forced the Court so far in that direction. “[T]his decision is in large part a result of the Supreme Court’s error in unduly restricting the scope of forfeiture doctrine in *Giles v. California*.<sup>94</sup> In this case, there was substantial

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88. See 30A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 6371.2 (Supp. 2006).

89. See *supra* text accompanying notes 62–79.

90. *Bryant*, 131 S. Ct. at 1157 n.8 (“The existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight.”).

91. *Id.* at 1158–60.

92. Richard Friedman, *Preliminary Thoughts on the Bryant Decision*, THE CONFRONTATION BLOG (March 2, 2011, 12:42 AM), <http://confrontationright.blogspot.com/2011/03/preliminary-thoughts-on-bryant-decision.html>.

93. *Id.*

94. *Giles v. California*, 554 U.S. 353 (2008). In *Giles*, the Court, led again by Justice Scalia, held that unconfessed testimonial statements made by a declarant unavailable at trial are not made admissible under the forfeiture by wrongdoing exception to the Confrontation Clause

evidence, easily enough to justify a finding, that Bryant had killed Covington and therefore that he himself was at least the initial cause of his inability to cross-examine Covington,” Friedman notes.<sup>95</sup> “Accordingly, a court easily could have held that Bryant forfeited the confrontation right—had *Giles* not foreclosed the possibility by holding that even a defendant who murders a witness forfeits the right only if he commits the murder for the purpose of rendering the witness unavailable.”<sup>96</sup> Thus, the “bottom-line result of the Michigan Supreme Court’s decision—that Covington’s statements were inadmissible—is singularly unappealing at a gut level,” and signifies the inevitable result that “courts would compensate for the unavailability of forfeiture in cases like this by narrowing the confrontation right.”<sup>97</sup>

Professor Friedman’s analysis of both *Bryant* and *Giles* puts into perspective the reality of the current state of the Court’s Confrontation Clause jurisprudence. While *Crawford* signifies a significant turning point in confrontation rights and requirements, and has been widely praised by many—including Friedman himself<sup>98</sup>—the cases that have come in its wake, including *Davis* and *Giles*, have forced the Court into a position where a result like *Bryant* is seemingly unavoidable. In short, *Crawford* was a difficult pill for prosecutors to swallow, and this difficulty has only been exacerbated by further expansion of the Confrontation right in cases such as *Giles*. Thus, *Bryant* represents a step back from *Crawford* in that it appears to create a broad and uncertain exception to *Crawford*’s confrontation right. How broad the “ongoing emergency” exception is, however, remains unclear.

Given that “[r]ules of criminal evidence are applied every day in courts throughout the country,” it behooves the Court to promptly delineate a straightforward standard that can keep parties from being “left in the dark” on this matter.<sup>99</sup>

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absent a showing that the defendant *intended* to make the witness unavailable so that the witness could not testify in court. *Id.*

95. Friedman, *Preliminary Thoughts on the Bryant Decision*, *supra* note 92.

96. *Id.*

97. *Id.*

98. See, e.g., Friedman, *Crawford and Davis: A Personal Reflection*, *supra* note 46; see also Richard Friedman, *Confrontation as a Hot Topic: The Virtues of Going Back to Square One*, 21 QUINNIPIAC L. REV. 1041 (2003) (Friedman makes a pre-*Crawford* proposal as to how the Court should construe the Confrontation Clause. In *Crawford*, the Court did, in fact, go on to embrace this approach.).

99. *Crawford v. Washington*, 541 U.S. 36, 75–76 (2004) (Rehnquist, C.J., dissenting).

## II. “Ongoing Emergency” Examples and Standards

Under *Crawford* and *Bryant*, there are various scenarios in which applying the Court’s “ongoing emergency” analysis may lead to results that are either confusing, undesirable, or both. Take, for instance, a case involving grand theft from an electronics store. While this is hardly the case of the century, the simple facts provide a straightforward example of the difficulties that can arise.

Envision a scenario in which a relatively inexperienced off-duty police officer is shopping in an electronics store. While in the store, the officer observes the suspicious behavior of a man with whom the officer had had prior crime-related contacts. After briefly observing the man’s suspicious behavior from an inconspicuous vantage point within the store, the officer observes the man walk out the store’s exit carrying what appears to be a packaged television valued at approximately \$1,000. Assume that the man does not see the off-duty officer. Unsure as to whether or not the man paid for the television, the officer approaches a sales clerk and, without identifying himself as a police officer, inquires as to the man’s actions.

The sales clerk informs the officer that she did not personally observe the man pay for the television. She also states that earlier in the day, there were three packaged televisions on the store’s shelf. “Now,” the clerk explains, “there are only two.”

Clearly, the clerk’s statements serve as strong evidence of the suspect’s wrongdoing. They may also be extremely useful in informing the officer’s own determination as to whether he should confront the suspect at that moment.<sup>100</sup> Presumably, each passing moment marks a decrease in the likelihood of locating the suspect while in possession of the television. The suspect could easily pawn off the television or store it in a location where police might never find it. Thus, if the television is in fact stolen, the officer has a strong interest in preserving the physical evidence in this case and catching the suspect in possession of the television while in the vicinity of the store.

After questioning the store clerk, the officer hurries outside to the store’s parking lot. There, he observes the man, who he suspects of theft, placing the packaged television in the backseat of his car. The officer approaches the suspect and questions him about the television. Despite the suspect’s claim that he owned the television and was merely trying to

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100. Thus, the clerk’s statements may be offered either (1) as evidence of the man’s wrongdoing, or (2) not for the truth of the matter asserted, but instead as the basis for the officer’s actions thereafter. Clearly, because the prosecution would prefer the statements be considered as evidence, admitting the statements under the former is preferable to the later.



return it, the officer believes he has probable cause to arrest the suspect for the theft, and he proceeds to do so.

Although the suspect was caught with the television in his possession and cannot provide a receipt for it, the officer foolishly decides to return the item directly to the store instead of booking it into evidence as he should have done. The television is eventually sold by the store and, as a result of poor police work, the state is without a piece of physical evidence central to its case.

Notwithstanding this glaring problem, because the suspect has a lengthy criminal history, the assistant district attorney decides to file a felony grand theft charge. In the course of pre-trying the case, the prosecutor conveys a plea offer to the suspect-turned-defendant. The defendant rejects the offer and the case proceeds to a preliminary hearing. At the hearing, the prosecutor relies on the testimony of the arresting officer and a store manager, through whom the prosecutor admits surveillance video showing the defendant entering the store empty-handed and leaving with the television. Without relying on the statements of the sales clerk, the defendant is held to answer, and the case is transferred to a felony trial court. The defendant continues to reject the state's offer and the case proceeds to trial.

The prosecutor intends to introduce the statements of the store's sales clerk to the officer in order to establish that after the defendant left, there was one less television than there previously had been. Before trial, the prosecutor learns that the clerk no longer works at the store, has since left the state to attend college, and cannot be reached. Consequently, the prosecutor informs the court and the defendant's attorney that he plans to introduce the statements as present sense impressions.

The defendant's attorney objects to the admission of the clerk's statements on Confrontation Clause grounds, arguing that the statements are testimonial and that the clerk has not been made available for cross-examination. The prosecutor, citing to *Bryant*, argues that the statements are not testimonial because their "primary purpose . . . was to enable police assistance to meet an ongoing emergency."<sup>101</sup> Assuming that the statements would strengthen the state's case against the defendant, how should the trial court rule on their admissibility?

There are several issues to consider in this case. First, the prosecutor may want to argue that the police officer, acting in an off-duty capacity, was not truly an "agent of law enforcement" and that therefore, the

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101. *Michigan v. Bryant*, 131 S. Ct. 1143, 1167 (2011) (citing *Davis v. Washington*, 547 U.S. 813, 822 (2006)) (internal quotation marks omitted).

statements were not truly testimonial.<sup>102</sup> While this reasoning is tenuous for various reasons,<sup>103</sup> if the court were to entertain this argument, its ruling might turn on whether the store clerk was somehow aware that the man asking her about the defendant was a police officer.

This, in turn, would raise concerns acknowledged in *Bryant* regarding the purposes underlying the questioning from the viewpoint of both the interrogator (here, the officer) and the declarant (the clerk).<sup>104</sup> Specifically, what will the court view as the clerk's "objective" primary purpose in making her statement to the officer?<sup>105</sup> Did she even suspect a television had been stolen? If so, did she foresee that her statements could be used in a later prosecution? Alternatively, did the clerk merely intend to aid in the recovery of the television? Could she have possibly intended both, resulting in the "mixed motive" dilemma that Justice Scalia insists is only compounded by the Court's current practice of looking to the viewpoint of both the declarant and the interrogator?<sup>106</sup>

Whether or not the trial court actually needs to undertake such inquiry depends on whether the off-duty officer is actually an agent of law enforcement at all. Should the court somehow accept the prosecutor's argument and find that the clerk's statements were not made to a law enforcement agent, there is the possibility that the statement will be viewed as non-testimonial altogether. Despite the apparent weakness of arguing that the off-duty officer should not be viewed as an arm of law enforcement

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102. This in itself is not a surefire way to ensure admissibility, as the Court had not yet ruled on this. See *Davis*, 547 U.S. at 823 n.2 (noting that "[o]ur holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial'").

103. Chief among these reasons may be the fact that the officer did place the defendant under arrest. But consider how statements made to privately-employed loss-prevention officers might be viewed by the Court? What about statements made to ordinary civilians making citizen's arrests?

104. *Bryant*, 131 S. Ct. at 1160–61.

105. *Id.*

106. *Id.* at 1170 (Scalia, J., dissenting) ("The Court claims one affirmative virtue for its focus on the purposes of both the declarant and the police: It 'ameliorates problems that . . . arise' when declarants have 'mixed motives.' I am at a loss to know how. Sorting out the primary purpose of a declarant with mixed motives is sometimes difficult. But adding in the mixed motives of the police only compounds the problem. Now courts will have to sort through two sets of mixed motives to determine the primary purpose of an interrogation.") (citation omitted). Scalia is not the only commentator to have acknowledged the difficulties inherent in the Court's approach. See, e.g., Moreno, *supra* note 77, at 1216 ("The *Bryant* decision has amplified the confrontation confusion.").

for Confrontation Clause purposes, the Court has extended similar exceptions in the Fifth Amendment context.<sup>107</sup>

In terms of an “ongoing emergency” analysis, the trial court would be without much in the way of guidance. For one, how seriously can a prosecutor contend that the theft of a television constitutes an “ongoing emergency”? In this scenario, it seems that there is little, if any, possibility of physical danger posed to anyone.

On the other hand, the clerk’s statements do satisfy several of the criteria the Court found determinative in *Davis*.<sup>108</sup> Here, (1) the clerk was “speaking about events as they were actually happening,” as the television was being brought to the suspect’s car,<sup>109</sup> (2) the statements were not formal, as they were made between a store clerk and a man in plainclothes asking about the possibly stolen merchandise while standing in the store itself, and (3) the “elicited statements were necessary to be able to resolve the present emergency.”<sup>110</sup>

While the use of a dictionary to address a legal issue is a questionable practice, the definition of “emergency” may be worth considering. The Merriam-Webster Dictionary defines “emergency” as “an unforeseen combination of circumstances or the resulting state that calls for immediate action.”<sup>111</sup> A second definition is also provided: “[A]n urgent need for assistance or relief.”<sup>112</sup> Under these definitions, it seems that the theft hypothetical may well suffice. Under the Court’s current Confrontation Clause law, the answer is less clear. This makes clear the problem of an

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107. See, e.g., *Illinois v. Perkins*, 496 U.S. 292, 300 (1990), in which the Court held that an undercover law enforcement officer was not required to provide Miranda warnings to an incarcerated suspect prior to asking the suspect questions that could result in incriminating responses. It would seem that, for purposes of Confrontation Clause analysis, the same logic underpinning *Perkins* could apply. After all, a declarant speaking to an undercover officer should have little, if any, expectation that his statements would be used in a criminal prosecution, as the declarant is presumably unaware that he is speaking with law enforcement. Thus, if a trial court is to embrace a declarant-centered approach, as Justice Scalia suggests is proper, then the declarant’s statements would lack certain testimonial qualities of those made by one knowingly speaking to the police. Should the declarant’s statements be viewed as non-testimonial?

108. *Davis v. Washington*, 547 U.S. 813, 827 (2006).

109. Admittedly, this might be a point of contention. Would the “emergency” cease once the suspect exited the store? Would it endure until the suspect drove away in his vehicle? In *Davis*, the Court noted, in dicta, that as soon as the defendant drove away from the premises, the emergency “appears to have ended.” *Id.* at 828. The victims’ responses to the operator’s questions were, from that point on, probably testimonial. *Id.* at 828–29.

110. *Id.* at 827.

111. *Emergency Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/emergency> (last visited Nov. 11, 2011).

112. *Id.*

uncertain set of factors for identifying an “ongoing emergency” all the more bemusing.

Consider another hypothetical that presents facts a court would be more willing to view as an emergency. Say that a confidential informant working for Immigration and Customs Enforcement (“ICE”) is also a member of La Mara Salvatrucha (commonly known as “MS-13”), the ruthless transnational gang comprised largely of Central American immigrants. Assume that the informant learns that two MS-13 gang members intend to detonate a grenade the next day at San Francisco’s Dolores Park.<sup>113</sup> The informant learns that the MS-13 members’ goal is to injure members of a rival gang, Nortenos, who plan to attend a barbecue at the park at the time.

Realizing the potential for harm to the public, the informant immediately contacts ICE agents and notifies them of the gang’s plan. He also informs them that, on this particular occasion, the gang members have already left at least one active grenade at the scene of the planned detonation. The rationale for doing so, he explains, is the gang members’ fear of an impending raid at one of their homes by law enforcement.

ICE agents immediately contact the San Francisco Police Department and the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”), and officers from all three organizations respond to Dolores Park, where they find three live grenades located precisely in the place the informant claimed they would be. Investigators have the explosives dusted for fingerprints and swabbed for DNA, but they are unable to produce any significant match. Further, for whatever reason, there is no additional physical evidence that links the explosives to members of MS-13.

In addition to the lack of evidence linking the grenades to the gang members, the case against MS-13 becomes weaker when, just days after the explosives were found, the informant is fatally wounded in a drive-by shooting led by Nortenos—an ironic turn given that mere days before, it was the actions of this informant that potentially saved the lives of his assassins.

Nevertheless, the Assistant United States Attorney preparing a federal RICO indictment targeting members of MS-13 hopes to rely on the statements of the informant in support of attempted murder and conspiracy to commit murder charges against members of the gang. The federal

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113. This hypothetical is loosely based on actual reports of MS-13 gang members plotting to detonate a grenade in Dolores Park. See Evan Hill, *Feds Complain that S.F.’s Sanctuary City Policies Impeded Investigation of Latino Gang*, SF WEEKLY (Oct. 21, 2009), <http://www.sfweekly.com/2009-10-21/news/cop-blocked-feds-complain-that-s-f-s-sanctuary-city-policies-impeded-investigation-of-latino-gang/>.

prosecutor might be comfortable relying on the mere circumstantial evidence in his presentation to the grand jury, but he believes that he will need to rely on the informant's statements at trial in order to support the charges linked to this particular incident.

Because there exist no recorded conversations made by gang members pertaining to this incident, the prosecutor knows that he cannot rely on statements in furtherance of a conspiracy,<sup>114</sup> and he hopes to rely solely on the found explosives, the fact that the rival gang was going to have a barbecue there the following day, and the informant's statements to ICE agents in order to support the charges. The grand jury returns the indictment and, in the course of submitting the first set of motions in limine to the trial court, he asserts that the informant's statements to the ICE agent regarding the grenades were "non-testimonial" in that they fall under the "ongoing emergency" exception. In support of this proposition, the prosecutor cites to *Davis* and *Bryant*, insisting that the presence of explosives in Dolores Park surely posed a threat to the public.

The defense attorney counters this reasoning, arguing that to make such a ruling would amount to the court interpreting this exception too broadly. What if it had rained on the day the gang members intended to detonate the explosives, thereby canceling the barbecue and other activities in the park? What if the explosives were non-active and actually posed no threat? What if the basis for the informant's knowledge was unreliable, and it was actually the informant who planted the explosives in the park and fabricated a story of MS-13 gang involvement so as to implicate others in the crime, for whatever reason? Because the declarant was never subject to cross-examination and is no longer available, the defense attorney argues, how can we ensure the reliability of his statements?

The defense attorney then alludes to a hypothetical example in which an unavailable declarant reports vague bomb threats made by phone. The threats made surround a sporting event taking place not the following day, but perhaps a week later. Assume, the attorney argues, that police are not able to locate and resolve the threat until mere hours before the bomb is supposed to detonate, at which time the suspect is finally located and apprehended. Does this mean that every statement made by the declarant to police regarding the incident between his initial declaration and the resolution of the issue approximately one week later would fall under the ongoing emergency exception? What if the police never actually located

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114. FED. R. EVID. 801(d)(2)(E). Note that had any such statement existed, it would presumably be admissible over any Confrontation Clause objection, as the *Crawford* ruling explicitly acknowledged that statements made in furtherance of a conspiracy were not testimonial. *Crawford v. Washington*, 541 U.S. 36, 56 (2004).

any such explosives, and the person making the threats was only charged with making terrorist threats? Did an emergency actually exist? In such an instance, how would one mark the contours of such an “emergency”?

In light of the arguments made by counsel, how should the judge rule? And on what basis should he make his ruling? *Bryant* provides little guidance on this matter. Yet such situations are not altogether impossible, and there is little doubt that scenarios which may or may not be characterized as emergencies are considered by criminal trial courts throughout the United States every day, hence the need for a carefully-delineated set of guidelines for courts to follow.

### III. “Left in the Dark”

As one commentator suggested, some judges likely feel an inclination to look toward other criminal evidence exceptions when conducting an ongoing emergency analysis.<sup>115</sup> Together, the Fourth Amendment’s “exigency exception” and the Fifth Amendment’s “public safety exception” provide a good starting point from which one can begin to formulate standards to apply in the Sixth Amendment context.

#### A. Looking to Other Constitutional Exceptions: The Fourth Amendment

In *Mincey v. Arizona*, the Court acknowledged that “[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.”<sup>116</sup> There, plainclothes police officers were conducting a narcotics raid on an apartment. During the raid, an officer was shot and killed, and three other people in the apartment, including the defendant, were wounded. Pursuant to a departmental policy that prohibited police officers from investigating incidents in which they were involved, the officers did not conduct any search of the apartment other than briefly looking around for other victims following the shootings. Roughly ten minutes later, homicide investigators arrived and conducted an exhaustive four-day warrantless search of the apartment, which revealed 200 to 300 items seized by the investigators. Among the seized evidence were guns, bullets, shell casings, narcotics, and various drug-related paraphernalia. The defendant was subsequently indicted and convicted of multiple charges, including murder.

In considering the admissibility of the evidence supporting the conviction, the United States Supreme Court held that the officers’ initial warrantless search for possible victims was justifiable, but that the

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115. Fisher, *supra* note 52, at 589–90.

116. *Mincey v. Arizona*, 437 U.S. 385, 392 (1978) (internal citation omitted).

homicide investigators' subsequent four-day search was unconstitutional given that the emergency had ceased.<sup>117</sup> The Court rejected the state's argument that the nature of the offense at issue—a homicide—justified a categorical exception to the warrant requirement based on the need for immediate action.<sup>118</sup> Justice Stewart, writing for the majority, acknowledged that “[i]t simply cannot be contended that this search was justified by any emergency threatening life or limb,” noting that all persons in the apartment were located before the homicide investigators arrived.<sup>119</sup> Thus, “a four-day search that included opening dresser drawers and ripping up carpets can hardly be rationalized in terms of the legitimate concerns that justify an emergency search.”<sup>120</sup>

While the facts of *Mincey* failed to amount to an emergency, the Court has contemplated other scenarios in which it found such a label justified, thereby establishing an exception to the warrant requirement. In *Brigham City v. Stuart*, the Court held that law enforcement officers may proceed into a home without a warrant “to render emergency assistance to an injured occupant or to protect an occupant from imminent injury,” so long as the officers have an “objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.”<sup>121</sup> There, the officers had responded to a late night house party and, upon arrival, observed a fistfight involving a juvenile and four adults.<sup>122</sup> Rather than obtaining permission to enter the house, the officers forced their way in to break up the fight.<sup>123</sup>

In arriving at its holding, the Court distinguished the facts of the case from those of another, *Welsh v. Wisconsin*,<sup>124</sup> in which it declined to find an emergency where the only potential justification for one was a need to preserve evidence—that of a suspect's blood-alcohol level.<sup>125</sup> In rationalizing the finding of an emergency in *Brigham City*, Justice Roberts explained that “[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties.”<sup>126</sup>

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117. *Id.* at 392–93.

118. *Id.* at 392–94.

119. *Id.* at 393.

120. *Id.*

121. *Brigham City v. Stuart*, 547 U.S. 398 (2006).

122. *Id.* at 400–01.

123. *Id.* at 401.

124. *Welsh v. Wisconsin*, 466 U.S. 740 (1984).

125. *Brigham City*, 547 U.S. at 405 (citation omitted).

126. *Id.* at 406.

In *Michigan v. Fisher*, officers responded to the scene of a residential disturbance.<sup>127</sup> Upon arriving at the residence in question, the officers observed a damaged pickup truck in the driveway, blood on the hood of the vehicle, three broken windows on the exterior of the house, and the defendant inside the house, screaming and throwing things.<sup>128</sup> After observing that the defendant had a cut on his hand, and out of concern that the defendant might be throwing the objects at another person inside the home, the officers approached the front door and offered medical attention.<sup>129</sup> When the defendant refused, one of the officers forced his way into the home, only to see the defendant pointing a gun at him.<sup>130</sup> The defendant was eventually taken into custody and charged with assault with a dangerous weapon and possession of a firearm during the commission of a felony.<sup>131</sup>

In finding that the officer's warrantless entry into the residence did not violate the Fourth Amendment, the Court cited both *Mincey* and *Brigham City*, noting that the emergency exception "does not depend on the officers' subjective intent or the seriousness of any crime they are investigating when the emergency arises. It requires only 'an objectively reasonable basis for believing' that 'a person within [the house] is in need of immediate aid.'"<sup>132</sup>

Finally, there is *Kentucky v. King*, a recent case in which officers observed a suspected drug dealer enter an apartment from which the officers were able to smell marijuana emanating.<sup>133</sup> After knocking, the officers heard what they perceived to be evidence being destroyed inside the apartment.<sup>134</sup> The Court upheld the officers' subsequent warrantless entry.<sup>135</sup> The majority's holding relied on the fact that the officers did not engage in any actual or threatened Fourth Amendment violation prior to their warrantless entry.<sup>136</sup>

Perhaps more relevant is Justice Ginsburg's dissent, where she specifies the limits for what might constitute an emergency.<sup>137</sup> "[C]arefully

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127. *Michigan v. Fisher*, 130 S. Ct. 546, 547 (2009) (per curiam).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 548 (internal citations omitted).

133. *Kentucky v. King*, 131 S. Ct. 1849, 1854 (2011).

134. *Id.*

135. *Id.* at 1863.

136. *Id.*

137. *Id.* at 1864–65 (Ginsburg, J., dissenting).



delineated,” Ginsburg explains, “the [exigency] exception should govern only in genuine emergency situations. Circumstances qualify as ‘exigent’ when there is an imminent risk of death or serious injury, or danger that evidence will be immediately destroyed, or that a suspect will escape.”<sup>138</sup> This is, in fact, quite a broad exception, and Ginsburg’s specified limits are instructive in drawing the Confrontation Clause exception narrowly enough to avoid potential criticisms.

### B. Looking to Other Constitutional Exceptions: The Fifth Amendment

Cases describing the Fifth Amendment’s “public safety exception” to Miranda warnings employ language similar to that in the aforementioned Fourth Amendment cases.<sup>139</sup> In *New York v. Quarles*, a woman informed police shortly after midnight that she had just been raped by an armed man who had fled into a nearby twenty-four-hour grocery store with the weapon.<sup>140</sup> Upon entering the store, one of the officers found the defendant, who matched the description given by the victim.<sup>141</sup> Four officers took the defendant into custody, handcuffed him, and searched him for the gun, to no avail.<sup>142</sup> Without providing the defendant Miranda warnings, the officers questioned the defendant about the whereabouts of the weapon.<sup>143</sup> The defendant orally directed the officers to the weapon.<sup>144</sup> The trial court suppressed the weapon and the defendant’s unwarned statements on Miranda grounds, though the Supreme Court ultimately reversed this ruling, citing a “public safety exception.”<sup>145</sup> In this case, the police “were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket,” explained Justice Rehnquist, writing for the majority.<sup>146</sup> “So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to

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138. *Id.* at 1864 (Ginsburg, J., dissenting) (internal citations omitted).

139. For purposes of this paper, Miranda requirements are viewed as constitutionally based in light of the Court’s ruling in *Dickerson v. United States*, 530 U.S. 428 (2000).

140. *New York v. Quarles*, 467 U.S. 649, 651–52 (1984).

141. *Id.* at 652.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 652–53, 655–56.

146. *Id.* at 657.

the public safety: an accomplice might make use of it, a customer or employee might later come upon it.”<sup>147</sup>

In dissent, Justice Marshall raised a simple yet effective criticism of the exception: If there had truly been a public safety concern, why could the cops not simply find the weapon and protect the public?<sup>148</sup> Marshall notes, “If trickery is necessary to protect the public, then the police may trick a suspect into confessing. While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment or our decision in *Miranda v. Arizona* proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial.”<sup>149</sup>

Both in *Quarles* and in the years since, the Court has done little to provide any specific definition for “emergency” in a Fifth Amendment context. “The precise boundaries of the public-safety exception are difficult to ascertain—the Court has not clarified *Quarles*, leaving it to lower courts instead to reach conflicting fact-sensitive outcomes,” notes Professor Dressler.<sup>150</sup> All we are sure of is that “there must be an ‘objectively reasonable need to protect the police or the public from [an] immediate danger’; there must exist an ‘exigency requiring immediate action by the officers beyond the normal need expeditiously to solve a serious crime,’” and “the questions asked by the police in such circumstances must be ‘reasonably prompted by a concern for the public safety.’”<sup>151</sup>

With these examples, limits, and criticisms in mind, we now turn back to the Confrontation Clause.

### C. A Totality-of-the-Circumstances Test

Because of the wide variety of circumstances likely to result in what might be perceived as an ongoing emergency, it is extraordinarily difficult to formulate any sort of bright-line rule that can be applied to distinguish an ongoing emergency from a situation in which the statements offered by a declarant are deemed testimonial. Despite this difficulty, Justice Ginsburg’s definition of “exigent circumstances,” as noted above, is both a flexible and relatively straightforward way to define an “ongoing emergency”: “[W]hen there is an imminent risk of death or serious injury,

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147. *Id.*

148. *Id.* at 675–76.

149. *Id.* at 686 (Marshall, J., dissenting).

150. 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATION (4th ed. 2006).

151. *Id.* (no citation offered, though presumably quoting from the text of *Quarles*).

or danger that evidence will be immediately destroyed, or that a suspect will escape.”<sup>152</sup>

Justice Ginsburg not only voted with the majority in *Crawford*, she also dissented in *Bryant*, and has been a strong opponent of *Bryant*'s creation of “an expansive exception to the Confrontation Clause for violent crimes.”<sup>153</sup> Whether Justice Ginsburg would be more willing to embrace an actual definition that she personally authored—as it pertains to the Fourth Amendment—is not clear. If nothing else, however, having an actual definition is useful in that it guides lower courts and assures them of the limits of this exception. Further, the definition she offers is accommodated well by the following totality-of-the-circumstances test.

Per *Davis*, statements are non-testimonial “when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”<sup>154</sup> In order to determine whether there is an ongoing emergency, the court must examine the totality of the circumstances surrounding the interrogation. There are six factors relevant to this determination: (1) The risk of death or serious injury; (2) the danger that evidence will be immediately destroyed or that a suspect will escape; (3) whether the interrogation takes place in an exposed public area; (4) whether the declarant is capable of forming a purpose; (5) how remote in time the statement is to the event it describes; and (6) the formality of the statement.

The first two factors are taken directly from Justice Ginsburg's dissent in *King*.<sup>155</sup> Where there is a high risk of death or serious injury posed to either the declarant or interrogator, it seems doubtful that labeling the situation an “emergency” would be perceived as a misnomer. Further, there is more of an assurance that, under such circumstances, such statements likely would be reliable in that the declarant would be under the stress of excitement and less able to fabricate his statement. Such logic finds support in the justifications for the “excited utterance” exception to the hearsay rule,<sup>156</sup> and the same logic applies to factor four of this test.

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152. *Kentucky v. King*, 131 S. Ct. 1849, 1864 (2011) (Ginsburg, J., dissenting) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).

153. *Michigan v. Bryant*, 131 S. Ct. 1143, 1176 (2011) (Ginsburg, J., dissenting).

154. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

155. *King*, 131 S. Ct. at 1864–65 (Ginsburg, J., dissenting).

156. FED. R. EVID. 803 advisory committee's note (“The theory of Exception [paragraph] (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. 6 Wigmore § 1747, p. 135. Spontaneity is the key factor in each instance, though arrived at by somewhat different routes.”).

Factor four, however, is to allow for this consideration to be advanced in potential emergencies where a risk of death or serious injury might not be posed yet the circumstances are arguably exigent, such as the possibility of a grand theft suspect escaping.

Factor two is based on similar concerns. Namely, it is less likely for there to be a high degree of unreliability in situations in which a declarant is making statements to an officer not for the purpose of aiding in later prosecution, but instead to ensure that the evidence itself is recovered or that the suspect does not get away. This is, admittedly, less reliable, as there may well be overlapping concerns: What is, after all, the purpose of preserving the evidence or detaining the suspect, if not to subject him to criminal prosecution?

One argument might be that, in the case of the theft hypothetical above, the declarant store clerk is concerned with recovering the merchandise and not sustaining a loss. Further, the declarant will likely want to identify the thief so as to be aware of who not to allow in her store in the future, as well as to be able to exclude others from false accusation. Nevertheless, it is undeniable that use of the word “evidence” does in and of itself suggest criminal prosecution, and for that reason, this factor needs to be weighed with that in mind.

The third factor, whether the interrogation takes place in an exposed public area, is significant in part because of the safety concerns. If the officers have less of an opportunity to relocate the interrogation to a more formal setting, it is likely the result of a need to quell some sort of urgent crisis. This factor is closely linked with factor six, formality, for this very reason. If the declarant is in an open public area, as opposed to a stationhouse interrogation room, there is a lesser degree of formality and the statement offered is presumed to be less of the type “historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process.”<sup>157</sup>

Having discussed factors four and six and their interrelation to other considerations, there remains factor five: How remote in time the statement is to the event it describes. The rationale for this factor is straightforward: The further in time a statement is from the action or event it describes, the less reliable it is presumed to be. This is because an emergency does eventually cease, and statements made distant in time as opposed to simultaneously with an event are, quite obviously, less likely to be made in

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157. *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring). *See also* Robert P. Mosteller, *Softening the Formality and Formalism of the “Testimonial” Statement Concept*, 19 REGENT U. L. REV. 429 (2007) (suggesting that courts readily embrace Justice Thomas’ definition of “formality” as provided in *White*).

the course of an ongoing emergency. Thus, there exists more time for the declarant to fabricate or second-guess his observations.

Without question, there are shortcomings to this test. For one, it places great emphasis on considerations of reliability and temporal immediacy. As Justice Scalia noted in *Crawford*, “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”<sup>158</sup> And yet, while it appears circular in its reasoning, statements made during the course of an “ongoing emergency” are trustworthy because they are made presumably for the purpose of addressing the crisis at hand, and not to be used in lieu of testimony in a future prosecution. By virtue of this alone, these statements are inherently reliable.

The aforementioned six factors, while admittedly not exhaustive, help to ensure both that the emergency is, in fact, ongoing at the time of the statement’s making, and that the statements themselves are, in fact, reliable—the reason why non-testimonial statements are favored by the Court in the first place. Under such conditions, the declarant lacks either the motive or the presence of mind to fabricate a false story. When the possibility for cross-examination leaves the veracity of one’s account unchecked, the presence of an ongoing emergency, as determined by the aforementioned factors, helps provide an alternative check of sorts. These factors are to reassure courts that the primary purpose of a declarant’s statement is not to create “an out-of-court substitute for trial testimony.”<sup>159</sup>

A second potential criticism might be similar to that raised by Justice Marshall in his *Quarles* dissent:<sup>160</sup> Even if there is an ongoing emergency, why not allow the officers to use the statements in order to respond to the emergency itself? Why should the government be granted this exception to a Constitutional rule when it is the emergency itself—and not the evidence it produces—that they should be concerned with? In most cases, won’t being led to the actual cause of the emergency provide enough circumstantial evidence—as well as other direct evidence—of a criminal defendant’s wrongdoing to support a conviction?

One response to such a criticism might be that these factors seek to establish that police have a good-faith basis for their questioning, and are not merely trying to stockpile evidence for later prosecution. Thus, there is a good faith basis for the questioning—the resolution of an ongoing emergency—and one might argue that it would amount to bad public policy

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158. *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

159. *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011).

160. *New York v. Quarles*, 467 U.S. 649, 686 (1984) (Marshall, J., dissenting).

to require prosecutors to simply disregard such evidence obtained in the process of addressing the emergency. However, this may not necessarily be the strongest argument in favor of allowing the evidence, as public policy alone may well be an insufficient basis for finding an exception to a Constitutional mandate.

A stronger argument is similar to that offered by Professor Friedman.<sup>161</sup> Specifically, at common law, there existed a forfeiture-by-wrongdoing standard which prosecutors had come to rely on in the years preceding *Crawford*. Some might interpret this exception to be properly invoked for admitting statements such as those made by Anthony Covington in *Bryant*. After all, Covington died as a result of the actions of Bryant, who, under this line of reasoning, had thereby forfeited his right to confrontation. This exception to the Confrontation Clause (and the hearsay rule) is of great use in the very cases in which confrontation plays a significant role—those involving witness intimidation and unavailability.<sup>162</sup> Such an exception could undoubtedly be relied upon in the cases most affected by *Crawford*—those involving domestic violence, gangs, and homicides. *Bryant* would be no exception to this if not for the Court's ruling in *California v. Giles*, which would require proof that *Bryant* rendered Covington unavailable with the goal of preventing Covington from testifying at trial.<sup>163</sup>

Long before *Giles*, a defendant's preventing a witness from testifying was sufficient to forfeit his confrontation right, even where it was unclear why he rendered the witness unavailable.<sup>164</sup> Nevertheless, in the wake of *Giles*, statements such as Covington's would be inadmissible absent a showing that the defendant rendered the witness unavailable for the purpose of preventing testimony. Thus, it could be argued that an ongoing emergency exception is a response to the difficulties imposed on prosecutors by *Crawford* and *Giles*.<sup>165</sup> It could be further argued that this approach—admitting statements made in the course of an ongoing emergency, as they were in *Bryant*—serves as a countermeasure to the crippling effect *Crawford* and *Giles* had on particular types of prosecutions.

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161. See Friedman, *Preliminary Thoughts on the Bryant Decision*, *supra* note 92.

162. Joshua Christensen, *Beguiled by Giles: The Overlooked Duality of Forfeiture by Wrongdoing*, 62 ALA. L. REV. 645, 648 (2011).

163. *Giles v. California*, 554 U.S. 353 (2008).

164. See *id.* at 382–83 (Breyer, J., dissenting).

165. See *id.* In *Giles*, the Court, led again by Justice Scalia, held that unfronted testimonial statements made by a declarant unavailable at trial are not made admissible under the forfeiture by wrongdoing exception to the Confrontation Clause absent a showing that the defendant intended to make the witness unavailable so that the witness could not testify in court. *Id.*

### Conclusion

Given the amount of controversy raised since the ruling in *Crawford* and the confusion that has ensued in this time, the potential for criticism of the ongoing emergency exception and how courts might choose to apply it is seemingly endless. Yet, despite any perceived weaknesses in proposals such as that offered in this paper, one thing is certain: *Crawford*, while a laudable attempt to restore Constitutional rights to criminal defendants as they existed in 1791, is far from perfect.

Because of the abundance of Confrontation Clause litigation that has ensued since *Crawford*—and is sure to continue in the future—arguments such as Justice Rehnquist’s should be paid ample consideration: If courts are to employ a sweeping change in a Constitutional standard, the Court owes it to parties and judges alike to be clear on how to go about applying it. Providing definitions and tests for relevant terms and exceptions would seem a logical starting point.

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